

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	EB Docket No. 01-39
FAMILY BROADCASTING, INC.)	
)	
Order to Show Cause Why the Licenses for)	
Stations WSTX (AM) and WSTX-FM,)	
Christiansted, U.S. Virgin Islands,)	
Should Not Be Revoked)	
)	

MEMORANDUM OPINION AND ORDER AND HEARING DESIGNATION ORDER

Adopted: March 22, 2002

Released: March 28, 2002

By the Commission:

INTRODUCTION

1. In this order, we grant in part the exceptions filed August 28, 2001 by Family Broadcasting, Inc. to the Summary Decision of Administrative Law Judge Richard L. Sippel, FCC 01D-02 (released August 7, 2001), revoking the licenses for Stations WSTX(AM) and WSTX-FM in Christiansted, U.S. Virgin Islands. We affirm the Summary Decision insofar as the ALJ determined that revocation is warranted if conceded wrongdoer, former president, director and principal stockholder, Gerard Luz James, were to remain in control of the licensee. We conclude, however, for the reasons set forth below that the proposed transfer of control of Family from Asta and Gerard Luz James to their four adult children raises genuine issues of material fact concerning whether the licenses should not be revoked in order to permit a transfer. These issues warrant consideration at a hearing. We therefore set aside the Summary Decision in part and designate for consolidated hearing before the Presiding Judge in EB Docket No. 01-39 the transfer of control applications (File Nos. BTC-20010315AAJ and BTCH-20010315AAK) involving Stations WSTX(AM) and WSTX-FM. The specified issues shall include the material issues discussed herein, as well as any additional issues added by the ALJ at the request of the parties or on the ALJ's own motion. Our expectation is that the Mass Media Bureau will review the transfer applications in accordance with its ordinary processing procedures, and that it will formally request, through the Enforcement Bureau, that the ALJ add any additional issues deemed appropriate by its processing staff.

BACKGROUND

2. Stations WSTX(AM) and WSTX-FM share a main studio located at Fort Louise Augusta in Christiansted, U.S. Virgin Islands. Station WSTX(AM) is authorized to operate from a site at Fort Louise Augusta with 5 kilowatts daytime power and 1 kilowatt nighttime and an antenna height above ground level of 106.5 meters. Station WSTX-FM is authorized to operate from a site at Blue Mountain, also located in Christiansted, with 50 kilowatts effective radiated power and an antenna height above ground level of 41 meters.

3. Station WSTX-FM discontinued broadcast operation on October 15, 1994, allegedly because of the station's close proximity to the sea and damage from Hurricane Marilyn, and it remained off the air until January 18, 1997. These events had led to the designation for hearing on May 28, 1996 of Family's December 4, 1995 renewal application for WSTX-FM.¹ The renewal proceeding was ultimately terminated, with the grant of the renewal application, in June 1997 by the Summary Decision of Administrative Law Judge Edward Luton.² The ALJ, while finding willful and repeated violations of Section 73.1740 requiring a licensee to submit an informal, written request to remain silent, nevertheless determined that, in light of the station's return to the air on January 18, 1997 and continuous operation since that time, Family was qualified to remain a Commission licensee.

4. By its Order To Show Cause and Notice of Opportunity To Participate, the Commission on February 8, 2001 initiated a second enforcement proceeding relating to Family's operation of Stations WSTX(AM) and WSTX-FM in St. Croix.³ It directed Family to show cause why its licenses should not be revoked for misrepresentation and/or a lack of candor and for repeated and/or willful violations of the Commission's rules and, apart from the issue of revocation, whether to issue an Order of Forfeiture in an amount not to exceed two hundred seventy-five thousand dollars against Family.

5. Gerard Luz James is the principal stockholder, with his wife, Asta Luz James, of Family, the licensee since 1990 of WSTX(AM) and WSTX-FM in St. Croix.⁴ Until March 14, 2001, Mr. James also served as president and a director of Family. Barbara James-Petersen is the daughter of Gerard and Asta Luz James, who have three other grown children. Ms. James-Petersen was briefly employed as the stations' general manager from September 1990 to 1992. She is the current general manager, a position she has held since July 1998, and she has served as president since March 14, 2001.

6. After Family received the Order to Show Cause, Mr. Luz James resigned as president and director of the company and, as noted above, was replaced by his daughter Barbara James-Petersen. Family thereafter filed applications for authorization to convey the stock owned by Gerard and Asta Luz James to their four adult children. These applications, now pending

¹ *Family Broadcasting, Inc.*, DA 96-856 (rel. May 30, 1996).

² *Family Broadcasting, Inc.*, 11 FCC Rcd 18700 (ALJ 1997).

³ *Family Broadcasting, Inc.*, 16 FCC Rcd 4330 (2001), *recon. dismissed*, 16 FCC Rcd 12801 (2001).

⁴ Mr. and Mrs. Luz James own 93 per cent of Family's stock.

before the Mass Media Bureau, seek Commission authorization to transfer control of Family from Asta and Gerard Luz James to their four adult children. None of the children, except Barbara James-Petersen, has been employed at, or had any other connection with, the stations.

7. In a petition for reconsideration of the Order to Show Cause, filed on March 15, 2001, Family conceded that Stations WSTX(AM) and WSTX-FM had operated at variance from their authorizations and that inaccurate statements were made to the Commission concerning the relocation of the FM transmitter from its authorized site. It requested postponement of the hearing proceeding to give Family an opportunity to correct the various rule violations now that Barbara James-Petersen, instead of her father, is in charge of the stations' operation. The Commission dismissed the petition for reconsideration pursuant to Section 1.106(a), generally providing for reconsideration only of final actions.⁵

8. In the hearing proceeding, the Enforcement Bureau submitted a detailed request for Family to admit certain facts. All matters were admitted, largely without qualification, by Family. Motions for Summary Decision were thereafter filed by the Enforcement Bureau and by Family. The Bureau sought summary decision on all specified issues, urging that revocation of both licenses is the appropriate remedy but that a monetary forfeiture is not warranted. In seeking summary decision Family requested that the ALJ refrain from revoking the licenses or imposing a monetary forfeiture and that he also recommend that the Mass Media Bureau grant the pending transfer of control applications. Family did not ask that the assignment application filed with the Mass Media Bureau be consolidated with the above-captioned revocation proceeding or request the specification of additional issues raised by the proposed assignment. Family urged instead that the record, consisting of statements from Barbara James-Petersen and her father and of Ms. James-Petersen's deposition testimony, is sufficient to warrant approval of the assignment.

SUMMARY DECISION

9. The ALJ determined that there is no need for an evidentiary hearing in this case. Family, the ALJ noted, had not contested the merits of the allegations underlying the issues specified in the Show Cause Order. Its cooperation in responding to the Bureau's request for admission, according to the ALJ, makes a hearing unnecessary to determine whether Family had committed the technical violations alleged in the Show Cause Order, whether it had violated sections 1.89 and 73.1015 by failing to respond to official Commission correspondence and inquiries, and whether it had made material misrepresentations or lacked candor concerning the relocation of the transmitter from the site authorized for WSTX-FM. The ALJ's decisions as to these issues are described below.

10. *Operation at variance from the terms of the station licenses.* Family conceded that the stations were repeatedly operated at variance with their authorizations, often without the Commission's knowledge or authorization. In particular, on-site inspections of the stations were conducted by an agent from the Commission's San Juan, Puerto Rico, Office on August 19, 1997, December 4, 1997, September 8, 1998 and April 13, 2001. Family admits that at the time of each inspection Stations WSTX(AM) and WSTX-FM were operating at variance from the terms of their licenses and that Family did not have an STA to operate either station at variance

⁵ *Family Broadcasting, Inc.*, 16 FCC Rcd 12801 (2001).

from the terms of its authorization.⁶ The ALJ therefore found willful and repeated violations of Sections 73.1350(a), 73.1560(a), 73.1560(b), and 73.1690(b)(2).⁷

11. *Misrepresentation and/or Lack of Candor.* The ALJ also found several instances of admitted misrepresentation or lack of candor by Family. In two separate responses, for example, the licensee falsely stated that its move to an unauthorized transmitter location was due to damage to its authorized facilities from Hurricane Lenny or Hurricane Marilyn.⁸ In fact, Gerard Luz James has admitted that Family was evicted on October 15, 1994 from the authorized site for the FM transmitter because it did not pay the rent and that his statements to the contrary were false.⁹ Additionally, Family was deemed to have admitted that Gerard Luz James had falsely stated: (1) that the stations were operated in accordance with the terms of their authorizations and (2) that a fence completely enclosed WSTX(AM)'s antenna tower.¹⁰ It was also deemed to have admitted that James knew that these statements were false.

12. *Violation of Public Safety Rules.* The ALJ found no genuine issue of fact regarding Family's compliance with sections 73.49 and 11.35, requiring enclosure of an antenna tower with an effective locked fence and the installation of Emergency Alert System (EAS) equipment. Family conceded that there was no fence enclosing WSTX(AM)'s antenna tower at the time of the August 19, 1997 inspection; that a chain link fence was under construction, but incomplete, at the time of the December 4, 1997 inspection; and that the completed chain-link fence had an opening, which permitted access to the antenna tower, at the time of the September 8, 1998 and the April 13, 2001 inspections.¹¹ Family admitted that no EAS equipment was installed at the stations' main studio at the time of the April 19, 1997 and the December 4, 1997 inspections, and that the EAS equipment was not operational at the time of the September 8,

⁶ *Summary Decision*, FCC 01D-02 (ALJ rel. Aug. 7, 2001), at ¶¶ 16(j) through (q). Family admits further that it had an STA to operate WSTX(AM) at variance from June 17 through July 31, 1993, but that it did not resume regular operation of WSTX(AM) upon expiration of the STA or advise the Commission that the station was not being operated in accordance with its license terms. *Id.* at ¶ 16(a), (b), (d) and (f). Family also admits that, upon expiration of its STA for WSTX-FM, it did not resume operation of the station in accordance with its license or thereafter advise the Commission of its operation at variance from the terms of its license. *Id.* at ¶ 16(c) and (e). The ALJ determined that Family had promised to erect an FM antenna by September 1994, but that as of January 7, 1994 Family continued to be operating WSTX-FM at substandard facilities and without a current STA. *Id.* at n.8.

⁷ Section 73.1350(a) provides that the licensee is responsible for operating its broadcast station in compliance with the technical rules set forth in Part 73 of the Commission's rules and with the terms of the station's authorization. Sections 73.1560(a) and (b) set forth the permissible variances, respectively, from an AM station's authorized antenna input power, and from an FM station's authorized transmitter output power. Pursuant to Section 73.1690(b)(2), an FM station must secure a construction permit in order to move the antenna to another tower structure.

⁸ *Summary Decision*, ¶¶ 12(a) through (e).

⁹ Declaration of Gerard A. Luz James, dated March 14, 2001. *See also Family Broadcasting, Inc.*, FCC 01-188 ¶ 3 (rel. June 15, 2001), indicating that Mr. James's declaration reflects that he did not intend to deceive the Commission but was humiliated by Family's eviction from the site for nonpayment of rent.

¹⁰ *Summary Decision*, ¶¶ 16 (g) and (h), 18 (h) and (i). *See also Memorandum Opinion and Order*, FCC 01M-09 (rel. Apr. 25, 2001), holding that Family is deemed to have admitted for all purposes each of the Enforcement Bureau's 167 requests to admit, including the request to admit that Mr. Luz James knew various statements were false.

¹¹ *Summary Decision*, ¶¶ 18 (c), (f), (m) and (q).

1998 and the April 13, 2001 inspections.¹²

13. *Public Inspection File.* Section 73.3526 requires that commercial broadcast licensees maintain and make available for public inspection, at the station's main studio at any time during regular business hours, a file containing certain prescribed materials regarding the station's operation. Family admitted having no file at the main studio for either station at the time of the August 19, 1997 and April 13, 2000 inspections and the ALJ determined that the licensee willfully and repeatedly failed to maintain public inspection files.¹³

14. *Failure to respond to official Commission correspondence.* The ALJ found that as a follow-up to the four on-site inspections the Commission issued a total of five Notices of Violations and the staff sent a letter on July 19, 2000 directing Family to respond to questions regarding the relocation of WSTX-FM's transmitter from its authorized site. Based on Family's admitted receipt and failure to respond to the five Notices of Violations and to the staff's July 19, 2000 Letter, the ALJ found repeated violations of Section 1.89 requiring written responses within 10 days.¹⁴

15. *Sanctions.* Based upon the foregoing the ALJ found that there was no genuine issue of fact left to resolve by hearing and that the only remaining questions concerned law, policy and the appropriate sanction for Family's admitted, repeated rule violations.¹⁵ On the ultimate issue of Family's qualifications, the ALJ concluded that the Enforcement Bureau "has made its case that Family cannot be trusted to be truthful with the Commission or to operate its stations in accordance with the Communications Act and Commission rules or with a genuine concern for public safety."¹⁶ Family had admitted its repeated rule violations in operating both stations and the ALJ found overwhelming evidence to support findings and conclusions of serious violations. The repeated intentionally false statements of Gerard Luz James, the ALJ determined, established a pattern of lack of candor. Repeated failures to have EAS capability at both stations and to adequately prevent public access to the AM tower, despite being alerted to these violations on numerous occasions by FCC Inspectors, demonstrated a disregard for public safety. Given that truth and reliability are prerequisites to operating a broadcast station in the public interest, the ALJ determined that revocation is appropriate under Commission precedent¹⁷ and granted the Bureau's motion for summary decision.

16. By contrast, the ALJ determined that Family had not met its burden of proof for a

¹² *Summary Decision*, ¶¶ 20(a), (d), (l) and (n).

¹³ *Summary Decision*, ¶¶ 21, 22(a) and (d).

¹⁴ *Summary Decision*, ¶¶ 13, 14, 33.

¹⁵ *Summary Decision*, ¶ 31.

¹⁶ *Summary Decision*, ¶ 34.

¹⁷ *Summary Decision*, ¶ 34, citing *Chameleon Radio Corp.*, 13 FCC Rcd 13549 (1998), *recon. denied*, 15 FCC Rcd 24173 (2000), *appeal pending*, No. 00-1546 (D.C. Cir. filed Dec. 28, 2000); *Center For Study and Application of Black Economic Development*, 10 FCC Rcd 2836 (Rev. Bd. 1995), *recon. denied*, 10 FCC Rcd 6069 (Rev. Bd. 1995), *review denied*, 11 FCC Rcd 1144 (1996); *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), *aff'd in part*, 4 FCC Rcd 2553, *recon. denied*, 4 FCC Rcd 6312 (1989); *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 940, *review dismissed in part, denied in part*, 4 FCC Rcd 4596 (1990).

summary decision in which the licenses would not be revoked. Family's motion was predicated on the proposed transfer of control, without monetary consideration, of Luz James's (and his wife's) ownership interest to his children and on his removal as president and director eliminating all future problems at both stations. Citing Mr. Luz James's advanced age and ill health and resulting inability to influence or control the licensee, as well as the proposed transferees' alleged noninvolvement in any of the misconduct, Family claimed that the proposed transfer is consistent with Commission precedent.¹⁸

17. The ALJ determined, however, that doubts as to the independence of the proposed transferees created genuine issues of material fact, and that the past performance of current president Barbara James Petersen did not instill confidence that she could bring the stations into future compliance.¹⁹ The ALJ found "a particularly significant issue of fact" with respect to Ms. James-Petersen's independence as Family's chief executive officer, given the stations' continuing dependence on financial support from Asta James, who had given only a parole promise to provide the funds needed to improve and operate the station.²⁰ He also stated that "[t]here is no way of determining without further discovery and a hearing whether this loose financial arrangement might lead to residual control by the parents."²¹

18. The ALJ held that "the repeated wrongdoings and intentional untruths of Luz James cannot be confidently corrected in the future by a dubious assignment of control to children who will need to rely on the continuing financial generosity and wherewithal of the wife of Luz James."²² On this basis, the ALJ determined, for purposes of summary decision only, that the proposed assignment was not permissible under any of the cited exceptions to the general prohibition against a licensee assigning its license before favorable resolution of a revocation proceeding.²³

19. The ALJ also emphasized that this was the second enforcement proceeding involving this licensee. As noted in paragraph 3 above, Family's 1995 renewal application for WSTX-FM was designated for hearing, but that renewal proceeding was ultimately resolved in Family's favor. Despite the disapproval of WSTX-FM's prolonged, unauthorized silence expressed by another ALJ in favorably terminating the earlier FM renewal proceeding, the ALJ in this revocation proceeding noted, Family had again defied the Commission by failing to respond to official inquiries and lying about site locations.²⁴ In this regard, the ALJ found

¹⁸ Family cited *Nasby V. Petroleum*, 10 FCC Rcd 6029, 6033 (Rev. Bd. 1995), *remanded*, 11 FCC Rcd 3494 (1996) (permitting an interfamily assignment); *Second Thursday Corp.*, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970) (permitting assignment in the context of a bankruptcy if the wrongdoer does not benefit therefrom); and *Martin W. Hoffman*, 15 FCC Rcd 22086 (2000) (permitting assignment at a "distress sale" price under certain circumstances).

¹⁹ *Summary Decision*, ¶¶ 40-42. Barbara James Petersen has been employed as the stations' general manager since at least since July 1998. Following the March 2001 resignation of her father, Gerard Luz James, she assumed the presidency of Family.

²⁰ *Id.* at ¶ 41.

²¹ *Id.*, citing *Nasby*, 11 FCC Rcd at 3495-96.

²² *Summary Decision*, ¶ 46.

²³ *Summary Decision*, ¶¶ 35-38.

²⁴ *Summary Decision* ¶¶ 45.

insufficient mitigating circumstances to offset the purposeful violations attributable to Luz James and the licensee.²⁵

FAMILY'S EXCEPTIONS

20. Family challenges only the ALJ's ultimate conclusion that the licenses must be revoked notwithstanding the pending transfer of control applications. The licensee faults the ALJ for not crediting the deposition testimony of Barbara James Petersen that she is confident that, despite formidable obstacles, she will be able to turn the stations around financially. It also emphasizes the tremendous progress Ms. James-Petersen has made in restoring both stations to legal operation since becoming president on March 14, 2001. These efforts include applying for and receiving special temporary authorizations (STAs) that allow both stations to operate legally for the first time in years, and filing applications that, once granted and implemented, will permit both stations to operate in full compliance with all Commission rules on a permanent basis. Under Ms. James-Petersen's direction, Family has filed applications to reduce from 305 to about 180 feet the height of the AM tower (File No. BP-20010622AAF) and to move the FM station to a site on Recovery Hill (File No. BPH-20010316AAD). Grant of the former application, Family notes, will facilitate the replacement of the AM tower, which was knocked down for the third time in November 1999, by reducing the cost of its construction.

21. Family submits that there is no evidence that Barbara James-Petersen ever lied to the Commission concerning any matter. According to Family, Ms. James-Petersen was not involved in or aware of the numerous technical deficiencies at the stations. It claims that she did not know that operation of the FM station at the prescribed AM site was unlawful or that Family had been evicted from the station's authorized site for nonpayment of rent. Instead, she allegedly assumed that both stations were operated in accordance with their licenses and all Commission rules and regulations. Indeed, her declaration reflects she was utterly shocked when she saw the *Order to Show Cause*. She thereafter persuaded her father to turn over his stock to other family members, resign as an officer and director of Family and relinquish all involvement with the radio stations, and she has engaged legal and engineering counsel to clean up all violations at both stations. In her declaration, Ms. James-Petersen avers that, if she is allowed to correct the violations, the future operation of both stations will comport fully with all rules and regulations, the Communications Act, and the terms of the stations' licenses. Family acknowledges that, as reflected in the show cause order, Ms. James-Petersen had accompanied an FCC inspector during a visit to the stations that revealed a hole in the fence surrounding the AM tower, but claims that she immediately had the fence repaired. She also claims to have taken steps to reconstruct the stations' public file when missing items were brought to her attention during that same inspection. As to the inoperative EAS printer observed by the inspector, Ms. James-Petersen had already discovered the problem and the new equipment she ordered from the manufacturer arrived soon after the inspection.

22. By way of mitigation, Family notes the series of hurricanes that devastated the stations' facilities and area retail businesses, and the resulting loss in potential advertisers for the stations. It also points to its practices of liberally extending advertising time to devastated area businesses without requiring up-front payment or any payment at all, and of providing free broadcast time, often on a regular basis, to various local government departments. It further cites

²⁵ *Id.* ¶¶ 45, 47.

its donation of one-half hour of broadcast time, five days a week, to FEMA following Hurricane Marilyn that facilitated its communication with devastated areas of the island. Thus, Family submits that, despite the numerous rule violations, its stations (which are purportedly the only truly local stations serving the Virgin Islands) have served the public interest.

23. Family disputes the ALJ's distinction of *Second Thursday*, *Nasby* and *Hoffman*, all of which allegedly permit relief where, as here, the individual responsible for the wrongdoing receives no monetary benefit. Family maintains that only Mr. Luz James is responsible for the disqualifying misconduct in this case. His resignation as an officer and director and proposed gift of his stock (and his wife's stock) to their four children, who are all minority group members, makes the assignment appropriate under Commission precedent, according to Family. In particular, it urges that there is no potential benefit to Luz James nor, given his age and ill health, any possibility of him reasserting control over the licensee. Alternatively, Family submits that any questions of fact raised by the transfer of control applications must, pursuant to 47 U.S.C. § 309, be resolved by hearing and requests that the Commission withhold action in this revocation proceeding until hearing proceedings on the transfer of control applications are completed.

ENFORCEMENT BUREAU'S REPLY BRIEF

24. The Enforcement Bureau did not file exceptions to the Summary Decision. It agrees with the ALJ that under Commission precedent Mr. Gerard Luz James may not escape the consequences of his admitted lack of candor and numerous rule violations through the proposed transfer of control. Allowing the stock transfer to Mr. Luz James's children under the circumstances of this case, the Bureau believes, would be a sham to the detriment of the Commission's goal of deterring future wrongdoing. In particular, it claims, first, that there is no assurance of Mr. Luz James completely and irrevocably severing all ties to Family; second, that the present record reflects that Family's current president, Ms. Barbara James-Petersen, cannot operate the stations independently of her parents; and third, that Ms. James-Petersen knew or should have known of the various rule violations given her managerial position since July 1998, her presence at two FCC inspections, and her personal receipt of official correspondence that then went unanswered. §Extraordinary relief is unwarranted under the rationale of either *Hoffman* or *Nasby*, according to the Bureau, because the record does not allow a conclusion that the conceded wrongdoer, who resigned only after the *Order to Show Cause*, will be unable to influence the licensee post-transfer, and because his misconduct relates solely to the operation of WSTX(AM) and WSTX-FM. The Bureau believes that *Second Thursday* is inapposite because Family has not declared bankruptcy and there are no innocent creditors who would benefit from the transfer.

DISCUSSION

25. We grant Family's Exceptions in part. The ALJ is correct that, in the absence of record evidence affirmatively demonstrating the proposed transferees' future independence and ability to operate the stations in accordance with all statutory and regulatory requirements, Mr. Luz James's removal as officer, director and majority stockholder does not moot the disqualifying impact of his intentional misrepresentation and cavalier disregard of basic public interest responsibilities. Because we find a genuine issue as to these material facts, we affirm the ALJ's denial of Family's Motion for Summary Decision. We likewise affirm the ALJ's determination that, if Luz James remains in control, Family is not basically qualified and the

licenses for Station WSTX(AM) and WSTX-FM must be revoked. The record before us, however, does not provide a basis to determine that the proposed transfer of control is contrary to the public interest, and the Bureau has not shown that there are no genuine issues as to any material fact or that it is otherwise entitled to summary decision. We therefore designate for consolidated hearing before the Presiding Judge in EB Docket No. 01-39 the transfer of control applications filed by Family Broadcasting Inc. in connection with Stations WSTX(AM) and WSTX-FM.

26. The legal standard for a Motion for Summary Decision is set forth in section 1.251 of the rules, 47 C.F.R. § 1.251. That provision specifies in pertinent part that: “(d) [t]he presiding officer, giving appropriate weight to the nature of the proceeding, the issue or issues, the proof, and to the need for cross-examination, may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision.”

27. The Commission, in the report and order adopting the rule, indicated that the moving party must demonstrate not only that no genuine issue exists as to any material fact but also that it is entitled to summary decision as a matter of law.²⁶ It advised further that this extraordinary procedure should be utilized only where the parties are in agreement regarding the factual inferences that may be properly drawn from the record.²⁷ Thus, even when the basic facts are conceded and summary decision on those facts is appropriate, a hearing on the inferences to be drawn from them or as to the ultimate findings of fact may also be appropriate.²⁸ And, because a summary decision deprives a licensee of the opportunity for an evidentiary hearing, due process considerations require that the moving party must meet a stringent showing.²⁹ The presiding judge, in determining whether there is a genuine issue of material fact, must therefore scrutinize carefully the papers filed by the moving party but treat with considerable indulgence the pleadings of the opposing party. Furthermore, the moving party has the burden of proof even with respect to issues on which the opposing party would have the burden of proof at hearing.³⁰

28. Applying this standard, we find that neither Family nor the Enforcement Bureau is entitled to summary decision on the ultimate factual issue. The record establishes, and the parties agree, that Family, through Gerard Luz James, has repeatedly deceived the Commission, ignored Commission correspondence, operated both stations at variance from the terms of their

²⁶ *Summary Decision Procedures*, 34 FCC 2d 485, 486 ¶ 4 (1972). The legal standard codified in section 1.251 is essentially the same legal standard prescribed by the Federal Rules of Civil Procedure, which requires demonstration that “there is no genuine issue as to any material fact, *and that the moving party is entitled to a judgment as a matter of law.*” (Emphasis in the original) In this context, the Commission explained that “[d]ifferences in wording follow from the fact that the Commission renders ‘decisions’ rather than ‘judgments’ and that its decisions reflect policies of its own making as well as statutory and case law.” *Id.* at 487 ¶ 5.

²⁷ *Id.* at 488, noting that courts will deny a motion for summary decision where the disputed issue involves the evaluation of conceded facts in terms of legal and policy consequences. *See also Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (Rev. Bd. 1975).

²⁸ *Summary Decision Procedures*, 34 FCC 2d at 488 & n.3.

²⁹ *Midwest St. Louis, Inc.*, 79 FCC 2d 519, 529 (1980).

³⁰ *Summary Decision Procedures*, 34 FCC 2d at 487-89, quoting Professor Gellhorn, “Summary Judgment In Agency Adjudication.”

authorizations, and repeatedly violated various Commission rules, some of which are designed to promote public safety. There are no genuine issues of material fact as to Family's repeated lack of candor, demonstrated disregard for public safety and continued violation of a myriad of rules, during Mr. Luz James's tenure as president, and summary decision is warranted, pursuant to section 0.251, on Issues A through F. The record on these issues is substantial and, as the ALJ found, the licensee does not dispute the validity of the charges underlying their specification.

29. Summary decision is not warranted, however, based on the record before us, on whether the licenses for WSTX(AM) and WSTX-FM should be revoked. The ALJ is correct, and Family concedes,³¹ that revocation is warranted insofar as Gerard Luz James remains in control of the licensee. Family seeks to avoid revocation through the resignation of Luz James as president and director and the gift of his stock (and his wife's stock), subject to Commission consent, to their four adult children. Family relies on Commission precedent allowing a licensee whose license has been designated for revocation hearing to transfer the license to a third-party without first demonstrating the transferor's basic qualifications. Such transactions, however, are deemed to serve the public interest only in limited circumstances, all of which require, at the very least, consideration of the extent, if any, to which the individuals responsible for the wrongdoing will benefit from the transfer and a showing that such individuals will not be in a position to thereafter influence or control the licensee's affairs.³²

30. Whether a restructured Family under Barbara James-Petersen's direction will operate WSTX(AM) and WSTX-FM independently of Gerard Luz James, in the public interest, and in accordance with all applicable statutory and regulatory requirements is therefore material to the relief Family seeks. Given Ms James-Petersen's proposed reliance on her mother for financing and her undisputed tenure as the stations' general manager at least since July 1998, we agree with the ALJ that there are genuine issues of material fact that preclude the grant of Family's motion for summary decision. There is, for example, no documentary evidence as to the willingness and financial wherewithal of Asta Luz James to provide the funding necessary to bring both stations into compliance with Commission rules. Ms. James-Petersen's previous dependence on her parents creates genuine issues of fact as to whether a restructured Family will operate without influence from or monetary benefit to Luz James. A significant issue as to future correction of the repeated violations at WSTX(AM) and WSTX-FM is also raised by Ms.

³¹ See, e.g., *Family Broadcasting, Inc.*, FCC 01M-09 (rel. Apr. 25, 2001), granting the Bureau's motion to have responses deemed as admitted ("Family represents through counsel: 'Family will have admitted to all of the inaccuracies contained in the statements submitted by Mr. James to the Commission. Thus, the enforcement Bureau has made its case: if family remains under the control of Luz James, grounds exist to revoke family's licenses'"). (Capitalization as it appears in the original.)

³² *Petroleum V. Nasby*, 10 FCC Rcd 6029, 6033 (Rev. Bd. 1995), *remanded*, 11 FCC Rcd 3494 (1996) (renewal granted only after wrongdoer resigned his corporate position and assigned his ownership interest to a trust, controlled by non-family members, for the benefit of minor children and after a remand for a specific determination of whether the wrongdoer could potentially influence the licensee's affairs if the license were renewed); *Silver Star Communications-Albany, Inc.*, 6 FCC Rcd 6905 (1991) (sale at a reduced price permitted only after favorable resolution of hearing issue designated to determine whether the proposed buyer had secretly agreed to sell the stations back to wrongdoer so as to make the sale a charade enabling the wrongdoer to evade revocation of the license for his misconduct); *Faulkner Radio, Inc.*, 88 FCC 2d 612, 618 (1981) (renewal conditioned on total exclusion of wrongdoer from station operations); *Second Thursday*, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970) (assignment allowed in the context of a bankruptcy provided the individuals charged with the misconduct will have no part in future station operations and will either derive no benefit from the assignment or only an indirect benefit that is offset by equitable considerations favoring innocent creditors).

James-Petersen's managerial position at the stations since at least July 1998. Family's motion was properly denied, pursuant to section 1.251(d) of the rules, because it failed to show that no genuine issue exists as to these material facts.

31. Genuine issues as to these clearly material facts likewise compel the denial of the Enforcement Bureau's motion for summary decision. As the proponent of a motion for summary decision, the Bureau has the burden of proof even with respect to issues on which the licensee would have the burden at hearing.³³ It must thus demonstrate by record evidence that individual(s) responsible for Family's conceded wrongdoing will either continue to influence the licensee or will receive an improper benefit if the transfer of control is authorized, or that the transfer of control is otherwise precluded as a matter of law.

32. The Bureau has raised serious questions as to the familial transferees' future independence and managerial ability that, if not resolved in Family's favor after a hearing, will preclude approval of the proposed transfer of control and require revocation of Family's licenses. The mere raising of such questions, however, does not meet the Bureau's burden to show by affidavit or other material submitted for consideration by the ALJ that there is no genuine dispute as to these material issues. Indeed, Family, while conceding Barbara James-Petersen's employment in a managerial capacity and presence at inspections where violations were noted, maintains that she continued to rely on her father as chief executive officer to resolve these matters. Also, deposition testimony cited by the Bureau as demonstrating James-Petersen's ignorance of Family's financial and corporate affairs (and consequent incapacity to operate the stations independently),³⁴ is arguably consistent with the claim that Mr. Luz James remained responsible for these matters until he resigned his corporate positions in March 2001. Where, as in this case, the parties dispute the proper inferences to be drawn from conceded facts, summary decision on the ultimate issue is not appropriate. In any event, the record -- consisting of deposition testimony, detailed admissions and affidavits from James-Petersen and her father -- does not establish the transferees' inability to operate the stations in the public interest, in accord with all regulatory and statutory requirements, and in a manner not accruing to the benefit of the conceded wrongdoer. There is, therefore, no basis on the present record for an affirmative conclusion that approval of the assignment would disserve the public interest and that revocation is therefore required.

33. Nor has the Bureau shown that it is otherwise entitled to summary decision as a matter of law. In this regard, we note the ALJ's consideration of the assignment application, currently pending before the Mass Media Bureau, only in the context of Family's motion for summary decision. We disagree with the ALJ that the transfer of control, if supported by the

³³ In the above-captioned revocation proceeding the Enforcement Bureau, pursuant to Section 312(d) of the Communications Act, 47 U.S.C. § 312(d), had the burden of proceeding with the evidence and the ultimate burden of proof. The ALJ properly found, as set forth above, that the Enforcement Bureau met that burden. Insofar as Family seeks to avoid revocation through the transfer of control application, the licensee has the burden of demonstrating, pursuant to 47 U.S.C. § 312(d), that its approval serves the public interest.

³⁴ The Bureau points, for example, to deposition testimony that James-Petersen does not know the extent of Family's indebtedness or net worth (Dep. at 486); or the identity of creditors owed \$300,000 in long-term debt according to Family's 1996 and 1997 tax returns (Dep. at 45-46) or stockholders owed more than \$400,000 (Dep. at 42-43). It also cites her inability to locate certain corporate documents, including tax returns for 1998 through 2000, stock ledgers, directors' minutes, and any document showing Family to be a corporation of good standing under the laws of Puerto Rico.

requisite evidentiary showings discussed above, is precluded under Commission precedent. Notwithstanding the continued disregard of the public interest exhibited by Family, under Gerard Luz James's control, Stations WSTX(AM) and WSTX-FM provide truly local service to the Virgin Islands and have been devastated by a series of hurricanes. In circumstances ensuring the future lawful operation of these stations in the public interest at the sole direction of persons having no responsibility for the licensee's previous violations and lack of candor and in a manner that does not improperly benefit any individual responsible for Family's previous performance, there could be a basis to find that the proposed transfer of control would serve the public interest despite the usual prohibition against a transfer by a licensee involved in a revocation proceeding.³⁵

34. In view of the foregoing, we conclude that the applications to transfer control of Family Broadcasting Inc. (File Nos. BTC-20010315AAJ and BTCH-20010315AAK), now pending before the Mass Media Bureau, raise genuine questions of material fact that warrant consideration in this hearing proceeding. We therefore designate the transfer of control application for consolidated hearing before the Presiding Judge in this revocation proceeding. We note that these applications have not been processed by the Mass Media Bureau and suggest that the Bureau avail itself of the opportunity to have the Enforcement Bureau formally request that the ALJ add any further issues deemed appropriate by its processing staff. The Presiding Judge shall thereafter prepare an Initial Decision on the following issues and on any additional issues added by the ALJ at the request of either party or on the ALJ's own motion:

- (a) To determine whether, if the transfer of control applications are approved, Family Broadcasting Inc. will be influenced or controlled by Gerard Luz James;
- (b) To determine whether transferors Gerard and Asta Luz James, as either creditors or debtors of Family Broadcasting Inc. or in any other capacity, will benefit, directly or indirectly, if the transfer of control applications are approved;
- (c) To determine whether transferee Barbara James-Petersen, in her capacity as general manager from July 1998 until March 2001, misrepresented facts and or lacked candor with the Commission concerning the operation of WSTX(AM) and WSTX-FM;
- (d) To determine whether transferee Barbara James-Petersen, in her capacity as general manager from July 1998 until March 2001, willfully or repeatedly operated WSTX(AM) and WSTX-FM at variance from the terms of their licenses;
- (e) To determine whether transferee Barbara James-Petersen, in her capacity as general manager from July 1998 until March 2001, willfully or repeatedly violated Sections 1.89 and/or 73.1015 of the Rules by failing to respond to official Commission correspondence and inquiries;

³⁵See *Nasby V. Petroleum*, 11 FCC Rcd 3494 (1996).

- (f) To determine whether transferee Barbara James-Petersen will operate WSTX(AM) and WSTX-FM independently of any control or influence from transferors Asta and Gerard Luz James;
- (g) To determine whether transferee Barbara James-Petersen will have sufficient financing and managerial capacity to ensure enclosure within an effective locked fence of WSTX(AM)'s antenna as required by Section 73.49;
- (h) To determine whether transferee Barbara James-Petersen will have sufficient financing and managerial capacity to ensure the installation and maintenance of operational EAS equipment for Stations WSTX(AM) and WSTX-FM as required by Section 11.35;
- (i) To determine whether Family Broadcasting, Inc. under the direction of transferee Barbara James-Petersen will operate WSTX(AM) and WSTX-FM in accordance with the Rules, the Communications Act, and the terms of their authorizations as required by Sections 73.1350(a), 73.1560(a), 73.1560(b), and 73.1690(b); and
- (j) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether approval of the transfer of control application will serve the public interest.

In the event that Issue (j) is resolved adversely, we will revoke the licenses for stations WSTX(AM) and WSTX-FM pursuant to the Summary Decision, FCC 01D-02 (rel. Aug. 7, 2001) as affirmed herein.

35. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike, filed October 3, 2001 by Family Broadcasting, Inc. IS DENIED.³⁶

36. IT IS FURTHER ORDERED, That the Exceptions and Brief In Support of Exceptions, filed August 28, 2001 by Family Broadcasting, Inc. ARE GRANTED in part; that the Motion for Leave to File Additional Exception, filed October 31, 2001 by Family Broadcasting, Inc. IS DISMISSED; and that the Summary Decision of Administrative Law Judge Richard L. Sippel in *Family Broadcasting, Inc.*, FCC 01D-02 (rel. August 7, 2001), IS

³⁶ By its motion Family requests that the Commission strike those portions of the Bureau's reply brief suggesting that Barbara James-Petersen was somehow involved in the wrongdoing at Stations WSTX(AM) and WSTX-FM. Such assertions are procedurally improper, according to Family, because the ALJ did not find Ms. James-Petersen was complicit in any of the wrongdoing and because any disagreement with the ALJ's findings should have been raised in exceptions to the summary decision. We disagree that the Bureau, having filed no exceptions to the Summary Decision, is precluded from raising these matters in its reply brief. The applications to transfer control of Family to Asta and Gerard Luz James's four adult children are pending before the Mass Media Bureau, not before the ALJ. The question of James-Petersen's involvement in the wrongdoing therefore became relevant for consideration by the ALJ only in the context of *Family's* Motion for Summary Decision. Because the ALJ could not approve or reject the transfer applications, it was not incumbent on the Bureau to file exceptions to the Summary Decision in order to address issues relevant only to applications beyond the ALJ's jurisdiction. The licensee, however, sought summary decision based on the proposed transfer of control and now seeks review of the ALJ's denial of that motion. In response, the Bureau is entitled to address the clearly relevant impact of Ms. James-Petersen's managerial position.

SET ASIDE to the extent reflected herein and otherwise IS AFFIRMED.³⁷

37. IT IS FURTHER ORDERED, That the transfer of control applications (File Nos. BTC-20010315AAK and BTCH-20010315AAJ) filed by Family Broadcasting, Inc ARE DESIGNATED FOR CONSOLIDATED HEARING, before the Presiding Judge in EB Docket No. 01-39 on the issues set forth in paragraph 34 above and on any other issues added by the Presiding Judge at the request of any party or on the judge's own motion.

38. IT IS FURTHER ORDERED, That, pursuant to 47 U.S.C. §§ 309, 310(d), Family Broadcasting Inc. shall have the burden of proceeding and the burden of proof as to all of the specified issues.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

³⁷ In response to the Enforcement Bureau's Opposition to the Motion to Strike, Family seeks to file an additional exception directed to the ALJ's finding that the earlier renewal proceeding involving WSTX-FM should have alerted anyone connected with Family, including Barbara James-Petersen, to the problems at both stations. Family initially failed to file exceptions on this point, because it believed that the earlier proceeding was beyond this ALJ's jurisdiction. The ALJ's finding as to the earlier proceeding, however, is inextricably related to issues as to Ms. James-Petersen's complicity in, and knowledge of, matters that Family claims were solely the responsibility of conceded wrongdoer Gerard Luz James. Given our determination herein that there are genuine disputes as to these material facts that cannot be resolved on the existing record, the request to file additional exception is moot. It may therefore be dismissed without regard to any question concerning the procedural propriety of further exceptions.